

U. STATES
v.
SCHOONER
PEGGY.

But yet where a treaty is the law of the land, and as such affects the rights of parties litigating in court, that treaty as much binds those rights and is as much to be regarded by the court as an act of congress; and although restoration may be an executive, when viewed as a substantive, act independent of, and unconnected with, other circumstances, yet to condemn a vessel, the restoration of which is directed by a law of the land, would be a direct infraction of that law, and of consequence, improper.

It is in the general true that the province of an appellate court is only to enquire whether a judgment when rendered was erroneous or not. But if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional, and of that no doubt in the present case has been expressed, I know of no court which can contest its obligation. It is true that in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties, but in great national concerns where individual rights, acquired by war, are sacrificed for national purposes, the contract, making the sacrifice, ought always to receive a construction conforming to its manifest import; and if the nation has given up the vested rights of its citizens, it is not for the court, but for the government, to consider whether it be a case proper for compensation. In such a case the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside.

JACOB RESLER v. JAMES SHEHEE.

RESLER
v.

SHEHEE.
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THIS was a writ of error upon a judgment of the circuit court of the district of Columbia, sitting at Alexandria, in an action for a malicious prosecution brought by Shehee v. Resler, originally in the court of hustings for the town of Alexandria, and transferred by act of

congress of 27th February, 1801, concerning the district of Columbia, to the circuit court of that district.

RESLER
v.
SHEHEE.

The declaration stated that on the 26th of December, 1799, Resler, without reasonable cause, procured a certain false, scandalous, and malicious warrant, to be issued against Shehee, by F. Peyton, esq. then mayor of the town of Alexandria, charging Shehee with having received from a certain negro slave, called ——— the property of Baldwin Dade, certain stolen goods, viz. One box of tallow, knowing the same to be stolen; which warrant was executed upon the said Shehee, who, by means of the false and malicious representations of Resler, was recognized to appear before the court of hustings of Alexandria, at April term 1800, to answer to the charges contained in the warrant, at which court Shehee was acquitted.

mere discretion
in the court
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special plea to
be filed to set
aside that judg-
ment.

At the rules held at the clerk's office, on the 2d February, 1801, an office judgment was entered against Resler for want of a plea, and a writ of enquiry awarded; returnable to the court of hustings, which by law would have been held on the first Monday of April, 1801. But the act of congress of 27th February, 1801, which provides for the government of the district of Columbia, erected a circuit court for the district, to which it transferred all the causes then pending in the court of hustings; and enacted that the circuit court should hold four sessions a year in Alexandria, viz. On the 2d Mondays of January, April, and July, and the 1st Monday of October.

Two terms of the circuit court, viz. April and July, having elapsed without the writ of enquiry being set aside, the defendant Resler by his counsel, at October term 1801, on the 9th day of the month, appeared and moved the court to set aside the writ of enquiry on filing the following special plea in justification, viz. "And the said defendant by his attorney, George Youngs, comes and defends the force and inquiry, &c. and for plea saith, that on the 26th day of December, in the year 1799, at the town of Alexandria aforesaid, and within the jurisdiction of the court of hustings of said town, a box of tallow, belonging to the defendant, as his own proper goods and chattels, of the value of two dollars,

RESLER

v.

SHEHEE.

“ was stolen out of the house of the defendant, by some
 “ person unknown to the defendant, and the said defend-
 “ ant being informed by a certain John McGill, his jour-
 “ neyman, that the said box of tallow was in the house
 “ of the plaintiff, complained to Francis Peyton, mayor
 “ of the said town, of, and concerning the said box of
 “ tallow, who by his warrant, dated the 27th day of De-
 “ cember, in the year 1799, called the plaintiff before
 “ him and examined him; and upon his examination and
 “ the testimony of sundry persons, bound the plaintiff
 “ to appear at the next grand jury court of hustings of
 “ said town, to answer the charge contained in said war-
 “ rant, of, and concerning the receiving the said box of
 “ tallow, so stolen as aforesaid, and which was found in
 “ his possession, whereupon, the plaintiff appearing was
 “ acquitted and discharged by the said court, which is the
 “ same procurement of the said warrant and acquittal
 “ whereof the aforesaid action is brought, and this the
 “ defendant is ready to verify, &c.”

The plaintiff objected to the filing of that plea, in this stage of the cause, and upon argument, the court on the 13th day of October, refused to receive it; whereupon, the defendant took a bill of exceptions, and pleaded the general issue, upon which, on the 14th day of October, there was a verdict for the plaintiff, and judgment for 1000 dollars damages.

On that judgment the defendant brought his writ of error to this court, and the error assigned was the refusal of the court below to suffer the defendant to file the special plea above recited.

The cause was at this term argued by C. Lee for plaintiff in error, and Simms and Mason for defendant.

Lee. This case depends upon the law and practice of Virginia. By the *act of congress of 3d March, 1801*, supplementary to the act concerning the district of Columbia, sec. 3, it is enacted, “ that the circuit court for “ the county of Alexandria, shall possess and exercise “ the same powers and jurisdiction, civil and criminal, “ as is now possessed and exercised by the district courts “ of Virginia.”

The act of assembly of Virginia, respecting the district courts of that state, sec. 28, (*revised code*, p. 85.) provides, that "every judgment entered in the office against a defendant and bail, or against a defendant and sheriff, shall be set aside, if the defendant, at the succeeding court, shall be allowed to appear without bail, put in good bail, being ruled so to do, or surrender himself in custody, and shall plead to issue immediately." And in sec. 42, of the same act, p. 87, it is further provided, "That all judgments by default for want of an appearance or special bail, or pleas as aforesaid, and non-suits or dismissals obtained in the office, and not set aside on some day of the next succeeding district court, shall be entered by the clerk as of the last day of the term; which judgment shall be final in actions of debt founded on any specialty, bill, or note in writing, ascertaining the demand, unless the plaintiff shall choose in any such case to have a writ of enquiry of damages; and in all other cases the damages shall be ascertained by a jury, to be empaneled and sworn to enquire thereof, as is herein after directed."

KESLER
v.
SHEPHERD.

Upon an equitable construction of these sections of the act, the practice in Virginia has been to permit the defendant to come in at a subsequent term and avail himself of any such defence as he has, in the same manner as if he had pleaded it at the particular term mentioned. This question has been discussed in Virginia and received the construction for which I contend. The case of *Downman v. Downman's executors*, 1. *Wash.* 26, was a plea of tender after office judgment confirmed. In p. 27, the court say, these words "*plead to issue immediately*," are the same as were used in the old act of 1753, for establishing the general court; under which, the practice of that court was very liberal, in allowing a defendant to plead that which did not make an issue, but required subsequent pleadings, provided the real justice of the case, and not intended delay, was thereby promoted. This is unavoidable in cases of bonds with collateral conditions, where the defendant cannot plead to issue. This is also agreeable to the principle laid down by lord Holt, in 2. *Salk.* 622; "That though a judgment be ever so regularly entered, it shall be set aside at any time on payment of costs, so as the plaintiff does not

RESLER
v.
SHEHEE.

"lose a trial." And again in p. 28, "considering the circumstances of this country and the dispersed situation of the attorneys and their clients, who can seldom communicate with each other but at court, justice seems to require a relaxation in these rules (English rules) of practice. It would seem to me proper to allow a discretion in the judges to admit any plea which appears necessary for the defendant's defence, and only to resort to the rigor of the rule where delay appears to be intended." This plea then, if necessary for the defendant's defence, ought to have been admitted. It contains nothing exceptionable, and the facts stated in it, if true, are a justification. There is no case more proper for special pleading than one in which the prejudices of the people are enlisted on one side or the other. The law only directs what is to be done the first term, but afterwards it is left open to the discretion of the court. In this case there can be no pretence that the plea was intended for delay, as it was offered on the 9th, and the cause was not tried until the 14th of October, so that there was full time to answer the plea and make up the issue.

To shew that this plea is a good justification, I refer to the case of *Coxe v. Wirrall*, Cro. Jac. 193, where a similar plea was adjudged good upon demurrer.

It is common practice, even in the English courts, to permit the general issue to be withdrawn, and a special plea filed, where it is not done with an intent of delay. *Jefferys v. Walter*, 1 *Wilson*, 177—and 254, *Taylor v. Joddrell*. But the case of *Downman v. Downman*, before cited, seems conclusive upon this question.

Chase, Justice. Have the rules of the Virginia courts been adopted in the circuit court?

Lee. I conceive the circuit court at Alexandria, to be in the same situation as the district court at Richmond. And, as I understand the act of congress, they are obliged to adopt the practice of the courts of Virginia, except where the circuit court has actually made a different rule.

Simms, for defendant in error.

RESLER

v.

SHEHEE.

I will not deny that the courts of Virginia have gone the length stated in Washington's reports. They have used their discretion, and have considered whether the plea offered tends to the justice of the cause, or whether it is intended only for delay. In this case, the time having passed when the defendant could file his plea as a matter of right, it was entirely in the discretion of the court to admit or reject it.

It is certainly not a sufficient justification for the defendant to say that the magistrate committed the plaintiff; for that neither destroys the evidence of express malice, nor shews probable cause for the prosecution. The magistrate might have committed upon the evidence of the defendant Resler himself; so that this plea would most probably have been over-ruled upon demurrer, and at any rate would have created delay; for in a matter of so much consequence it cannot be presumed that the counsel for the plaintiff could at once determine whether to demur or to join issue.

The defendant was not precluded from making a proper defence. He might have shewn probable cause on the general issue, for the gist of the action is the want of probable cause; and the court had the power of instructing the jury whether such cause was shewn or not. *Buller, N. P. 14.*

It is said that the plea was offered in a reasonable time. It can not surely be said that three days in the hurry of the court is a reasonable time to answer such a plea—so say the courts of Virginia.

This plea amounts to the general issue, and therefore ought not to have been received. The justice of the case did not require it, and it is only to promote justice that the courts have ever deviated from the precise terms of the law.

Mason, on the same side.

Admitting for a moment that the practice of the Virginia courts was binding upon the circuit court, yet the

RESLER
v.
SHEHEE.

court have only exercised the same discretion which a Virginia court might have exercised. There is a particular time allowed for special pleading; after that time, the admission of a plea is discretionary with the court. The case in Washington's reports is clear to shew that it is altogether a matter of discretion. The court might have refused to receive any plea at all; for the right of the defendant to set aside the office judgment, by pleading to issue, is confined to the court next succeeding the office judgment.

But the defendant had every advantage under the general issue, which he could have had under his plea. It is extremely clear that the plaintiff must shew malice, and the defendant, matter of justification. The rules of practice in the courts of Virginia, are confined to Virginia. The courts of the United States are not bound by them. They have power to make their own rules.

Lee, in reply.

Our complaint is that the inferior court has not exercised its discretion in the manner it ought to do. I use the word *discretion*, differently from Mr. Mason. The exercise of such discretion is subject to the control of this court. If we look to the decisions of the courts in Virginia, we find that they have soundly exercised their discretionary power. The practice has constantly been to let in the parties notwithstanding any laches. Was it proper in the court to say, that although we have a right to suffer you to bring the question of probable cause before the court, and to take it from the jury, and although you wish so to do, yet we will not permit you, but will compel you to go before the jury; where facts disclosed, not pertinent to the issue, might make an improper impression?

Cushing, Justice. Do you admit that the defendant might have given in evidence under the general issue, the facts stated in the plea offered?

Lee. It is sufficient for us if it was a matter of doubt. In such a case, a cautious practitioner will always take the safest method, and plead the facts specially.

There is no doubt but the court had a right to make rules of practice for itself. But not having made such a rule in this case, its discretion ought to have been guided by the practice of the Virginia courts. We therefore hope that this court will correct the indiscreet exercise of the power of the court below in this case.

RESLER
v
SHEHEE.

The Court. It is true that the courts in Virginia have been very liberal in admitting any plea, at the next term after an office judgment, which was necessary to bring forward the substantial merits of the case, whether it was strictly an issuable plea, or not. But at a subsequent term, it is a matter of mere discretion with the court whether they will admit any special plea at all.

In the present case the facts, stated in the plea offered, might have been given in evidence on the general issue; the court exercised their discretion soundly in rejecting the plea.

Judgment affirmed.

TURNER v. FENDALL.

THIS was a writ of error to reverse a judgment of the circuit court of the district of Columbia sitting at Alexandria, rendered on a motion by Fendall against Turner, late sergeant of the corporate town of Alexandria, for the amount of money received by him on a fieri facias issued on a judgment in favour of Fendall against one Towers.

TURNER
v.
FENDALL.

This motion was grounded on an act of assembly of Virginia, revised code page 317. §. 51.—by which it is enacted that “If any sheriff, under sheriff, or other officer, shall make return upon any writ of *fieri facias* or “*venditioni exponas*, that he hath levied the debt, damages or costs, as in such writ is required, or any part thereof, and shall not immediately pay the same to the party, to whom the same is payable, or his attorney,” “it shall and may be lawful for the creditor at

A sheriff makes the money upon a fi. fa. at the suit of A. vs. B. and afterwards a fi. fa. against A. is put into his hands, he cannot levy it upon the money of A. made by the fi. fa. of A. v. B. for it does not become the goods and chattels of A. until